No. 12,975

IN THE

United States Court of Appeals

For the Ninth Circuit

LULA J. WILSON,
Appellant,

vs.

CORNING GLASS WORKS (a corporation),
Appellee.

APPELLANT'S REPLY BRIEF.

J. EDWARD JOHNSON,
W. G. HARMON,
WILLIAM H. HENDERSON,
ROBERT H. JOHNSON,
703 Market Street, San Francisco 3, California,
Attorneys for Appellant.

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I. INTRODUCTION.

Appellee has failed to make even a pretense at answering the crux of appellant's argument on this appeal, namely, that if Rule 38(d) is to be construed as defining a "waiver" of trial by jury to eliminate the element of intentional and voluntary relinquishment of the right to jury, it is contrary to the Seventh Amendment. (A.O.B., 11-17.) The cases cited by appellant on this constitutional point stand wholly uncontradicted.

Appellee has rather chosen to pad its brief with matter irrelevant to this appeal. (Note pp. 5-21 inclusive.) It has chosen not to follow the order found in appellant's opening brief, since to do so would have

highlighted its omission to answer the constitutional issue and authorities. In this reply, however, we will for the convenience of the Court follow the order of appellee's brief being answered.

II. ANSWERING APPELLEE'S STATEMENT OF THE CASE. (A.R.B., 1-4.)

We detect no quarrel with the sequence or accuracy of facts as set forth (A.O.B., 2-4) and especially those regarding the removal to the federal Court. The time to demand jury had expired prior to defendant's opposition to remand being filed.

Appellee alleges that "appellant had her day in Court" (A.R.B., 1-4), inferring that by now demanding a jury she is taking some kind of unfair advantage of appellee. This merely begs the question; her "day in Court", guaranteed by the Constitution, was *a day with a jury;* in opposing appellant's original motion for a jury appellee induced the Court to deprive her of that right. Re-trial is just and proper when a jury is erroneously withheld. *Baylis v. Travelers' Ins. Co.,* 113 U.S. 316, 28 L.ed. 989.

III. ANSWERING APPELLEE'S CONTENTION I THAT APPELLANT'S CASE LACKED MERIT. (A.R.B., 5-21.)

The nub of appellee's 16 pages of argument on the *merits* (pp. 5-21) which is irrelevant to the issues on this appeal and which obviously was inserted to becloud the true issue, is to be found in the assertion

contained in the last paragraph, bottom of page 20, that plaintiff failed to prove the charging part of her complaint and therefore had no case against the appellee, hence was not prejudiced through the denial of a jury.

The answer to this tenuous argument is short, simple and devastating: plaintiff had made out a *prima facie* case and defendant's motion for a nonsuit was denied. (Tr. 41-2; 44.) This raised a question of fact upon which plaintiff was entitled under the Constitution to have a jury. That right could not be satisfied in the absence of waiver by having a judge instead of a jury pass on the factual issue.

Appellee's repeated assertion that appellant "now wants a new trial because the trier of facts who found against her was a District Judge and not a jury" (A.R.B., 5), intimates that appellant deliberately planned a Court trial so she could claim a second trial before a jury should she lose before the Court, all to the prejudice of appellee. Nothing could be more false; appellant has consistently sought jury trial from the beginning and submitted to Court trial only after her motion for jury was overruled due to appellee's vigorous opposition. Appellee itself quotes authority that the interlocutory order denying jury was not appealable. (*Abbe v. New York, N. H. & H. R. Co.*, 171 F. (2d) 387.) Even in cases where a statutory appeal lies from an interlocutory order (as it does not here) no prejudice can result from a failure to elect such appeal rather than appealing from the judgment. (*Victor Talking Machine Co. v. George*,

105 F. (2d) 697, 699.) In truth, if blame there be for two trials, it lies squarely on the appellee who prevented jury trial in the first place over the objections of appellant.

IV. ANSWERING APPELLEE'S CONTENTION II THAT THE DISCRETION OF THE DISTRICT COURT IN REFUSING TO SET ASIDE WAIVER OF TRIAL BY JURY WAS NOT ABUSED. (A.R.B., 21-41.)

Examination of the decisions cited and quoted by appellee proves them to be not in point in that they do not consider the questions pertinent to this appeal. Many merely rely on Rule 38 as authority for the statement that failure to make demand for jury within the 10 days constitutes waiver. To cite them here, where the rule itself is challenged, is to lift oneself by his own bootstraps by classical circular reasoning.

Other cases cited were equity actions involving accountings and the like, or involved "advisory" juries only. Or we find that the passage of great lengths of time (up to two years), or intervening events prejudicing opponent or Court, or even the actual unequivocal statements of counsel that no jury was desired by the client, all indicate clearly that the statements quoted by appellee from such cases are not pertinent to the present set of facts.

Many of appellee's quotations are directed to false issues, and "prove" only what is clearly the law and naturally accepted as such by us. Thus the citations as to the effect that right to jury *can* be waived, *can*

be lost by inaction, *can* be lost by failure to make timely demand, etc., are straining to make a point already made by us in our opening brief. Conceding that it *can* be waived, and that the Court *can* accept such a waiver, the real problem is *was* it waived; this raises the issue of *what constitutes* a waiver. And at this point the shallow treatment by appellee becomes evident. Examination of the cases cited by appellee emphasizes that the Courts simply have not gone into the question here presented.

It should be here emphasized that appellee *cites no case whatever,* and we know of none, where the Court tests the "waiver" of Rule 38 against the essentials of a true waiver; all have been content to let the rule stand on its own merits in that regard and accept it as a "waiver" solely because the rule so terms it. However, we find that in practically all of the cases involving the point of waiver under Rule 38, a true waiver exists under the facts showing voluntary and knowing acts of relinquishment or facts from which the same was fairly inferred under the pre-rule cases. This has made it unnecesary for the Courts to really critically examine Rule 38 as to whether it violated the Seventh Amendment.

Appellee cites the notes of the Advisory Committee on Rules (A.R.B., 21-22), but this merely emphasizes the fact that under appellee's theory and that applied by the trial Court the safeguard of the Seventh Amendment was circumvented by Rule 38. State practice cited is of questionable help and clearly led the committee astray. It overlooked that the Seventh

Amendment applies only to federal Courts, not to state Courts. (*Pearson v. Yewdall,* 95 U.S. 294, 24 L.ed. 436, 437.)

Appellee quotes an extract from 23 Marq. L. Rev. 159 appearing in the commentaries to Rule 38, which overlooked *Pearson v. Yewdall,* supra, and similar cases. (A.R.B., 22.) Appellee carefully refrained, however, from quoting other law reviews preceding the Marquette extract in the commentaries. We briefly supply part of this deficiency:

> " 'It would seem that reference to state law to determine the right to trial by jury is clearly improper, not only on the theory that this is a federal constitutional question to be decided on the authority of federal cases, but also on the accepted conflict of laws doctrine that for choice of law purposes the right of trial by jury is a procedural matter.' 1941, 16 St. John's L. Rev. 44
> * * *
>
> " 'The right to trial by jury according to the rules of the common law as directed in the Enabling Act [Section 723c of this title] is of course preserved, but a method of waiver of jury trial has been provided for—an innovation in federal practice. * * * The purpose of the implied waiver was to protect judgments on defective special verdicts, and not to deprive litigants of trial by jury. * * *' 24 Minn L. Rev. 1."

Appellee then quotes numerous cases to the general effect that basic issues formerly triable as of right are still triable as of right under Rule 38. These cases lead directly up to the question in issue in

this appeal—then stop short before it without examining the rule as applied *here* to deprive a litigant of her constitutional right. *We invite the honorable Circuit Court to test the instant facts by any recognized definition of waiver excepting only the arbitrary one found in Rule 38(d). Only by a play on words can appellant's conduct be termed a waiver.*

In short, examination of the cases urged by appellee will show that the quoted phrases were merely general statements *assuming* Rule 38 to be *valid without questioning its constitutionality in any way: Etelson v. Metropolitan Life Ins. Co.,* 137 F. (2d) 62; *United States v. Strewl,* 99 F. (2d) 474 (failing to support the statement for which cited A.R.B., 36, and citing only a pre-F.R.C.P. case); *Hargrove v. American Cent. Ins. Co.,* 125 F. (2d) 225; *Bouis v. Aetna Casualty & Surety Co.,* 98 Fed. Supp. 176 (being not here in point as timely demand was clearly made); *McNabb v. Kansas City Life Ins. Co.,* 139 F. (2d) 591; *Steinhart Novelty Co. v. Arkay Infants Wear,* 10 F.R.D. 321; *Steiger v. Mullaney,* 8 F.R.D. 486 (no facts given, basis of discretion therefore unknown); *Gora v. Jenkins Bros.,* 8 F.R.D. 321 (no facts given but Court states no excuse given). Or involving an equitable, not common law, cause of action: *Arnstein v. 20th Century Fox Film Corp.,* 3 F.R.D. 58; *Fitzpatrick v. Sun Life Assur. Co. of Canada,* 1 F.R.D. 713; *Duignan v. United States,* 274 U.S. 195, 71 L. ed. 996; *McNabb v. Kansas City Life Ins. Co.,* supra ("doubtful" whether any jury ques-

tion existed); *Missouri Pac. Transp. Co. v. George,* 114 F. (2d) 757; *Guebenkian v. Guebenkian,* 147 F. (2d) 173. Or involving a *real, conscious and voluntary* waiver by conduct or failure to demand jury for several months or at all, usually to the prejudice of the Court and adverse party: *Kennedy v. David,* 109 F. (2d) 676; *Bank of Columbia v. Okely,* 17 U.S. (4 Wheaton) 235, 4 L.ed. 559; *Duignan v. United States,* 274 U.S. 195, 71 L.ed. 996; *Prince Line v. American Paper Exports,* 55 F. (2d) 1053 (no demand, even on appeal); *Hargrove v. American Cent. Ins. Co.,* 125 F. (2d) 225; *Johnson v. Gardner,* 179 F. (2d) 114 (9 months late; attorney admitted no jury intended); *Fidelity & Deposit Co. v. Krout,* 157 F. (2d) 912 (jury first requested at 2nd trial); *May v. Melvin,* 141 F. (2d) 22 (4 months late; jury first demanded at pretrial); *William Goldman Theaters v. Kirkpatrick,* 154 F. (2d) 66 (jury first demanded two years late at 2nd trial; counsel stated omission deliberate); *Baker v. General Motors Corp.,* 10 F.R.D. 512 (16 months late; 6 months after set for trial; attorney indicated omission deliberate); *Glasifier Mfg. Co. v. General Motors Corp.,* 138 F. (2d) 197 (no demand ever made); *Roth v. Hyer,* 142 F. (2d) 227 (no appeal on jury point after first trial—see *Roth v. Hyer,* 133 F. (2d) 5); *Albert v. R. P. Farnsworth & Co.,* 176 F. (2d) 198 (jury demanded at pretrial less than month before trial); *Reeves v. Pennsylvania R. Co.,* 9 F.R.D. 487 (year late, no reason given); *Bullock v. Sterling Drug,* 8 F.R.D. 575 (over three months late, party "agreed" jury waived). Or involving the raising of an issue

giving rise to right to jury: *Fidelity & Deposit Co. v. United States,* 187 U.S. 315, 47 L.ed. 194 (if no issue made, no right to jury). Or involving merely the timing of jury trial: (*Capital Traction Co. v. Hof,* 174 U.S. 1, 43 L.ed. 873 (no constitutional requirement for jury before justice of the peace so long as litigants accorded as of right an appeal therefrom and trial by jury in trial *de novo*). Or holding that the matter was properly submitted to the jury: *Yakus v. United States,* 321 U.S. 414, 88 L.ed. 834. Or being decided prior to adoption of the rule, being therefore confined obviously to holding on basis of a true waiver: *Prince Line v. American Paper Exports,* 55 F. (2d) 1053; *Patton v. United States,* 281 U.S. 276, 74 L.ed. 854.

Appellee quotes *Albert v. R. P. Farnsworth & Co.,* supra, at page 39, A.O.B., but omitted the next sentence of the text which reads as follows: "We are of the further opinion, however, that if upon remand the discretion of the Court is invoked under Rule 39(b) by a timely motion for jury trial, the Court may, *and in the absence of strong and compelling reasons should,* grant the motion." (Emphasis supplied.) This, we believe to be typical of the practice of appellee in its brief to distort the meaning of its quotations by removing them from context and ignoring the distinguishing factors involved.

Appellee quotes two other cases in this section that should be mentioned. *Delno v. Market St. Ry. Co.,* 124 F. (2d) 965 (A.R.B., p. 30), concerns itself with abuse of discretion only and does not contradict

appellant's position as stated. (A.O.B., 6-11.) *Abbe v. New York, N. H. & H. R. Co.,* 171 F. (2d) 387, confirms our position that no appeal from denial of jury lay until after final judgment. Appellee quotes the dissent of Judge Hand; the majority refused to go along with him on the matter.

V. ANSWERING APPELLEE'S CONTENTION A THAT UNFAMILIARITY WITH RULE 38 IS INSUFFICIENT TO SET ASIDE WAIVER OF TRIAL BY JURY. (A.R.B., 41-46.)

As throughout its brief, appellee ignores the effect of unconstitutionality of Rule 38, its argument being only directed to the question of abuse of discretion. Even so, it is unable to produce any authority higher than a District Court opinion. Appellee also ignores the distraction caused by the removal and remand proceedings in the instant case. Again we consider briefly the cases advanced by appellee:

In *State of Delaware v. Massachusetts Bonding & Ins. Co.,* 3 F.R.D. 65, the only excuse advanced was that counsel was unfamiliar with the rules. On rehearing this was shown to be false, and the decision naturally reversed. (In contrast, the affidavit of Mr. Johnson in the instant action (Tr. 24) stands alone and unchallenged to this date. Our facts are therefore like those of the original decision, not the rehearing.) The Court also indicated that "where application for jury trial under Rule 39(b) was refused, it appears there was some reason for the denial in addition to the waiver by failure to make demand pur-

suant to Rule 38(b)". * * * "Each application under Rule 39(b) must be examined in the light of the particular facts of the case."

In *MacDonald v. Central Vermont Ry., Inc.*, 31 Fed. Supp. 298, the claim for jury was made "long" after time had expired. The words italicized by appellee (A.R.B., bottom p. 42) emphasize the inapplicability of the holding as here the *appellee,* not appellant, "invoked the jurisdiction of the federal court", confusing appellant by the removal and remand proceedings.

An ironic note appears in the refusal of the district judge to rule on whether the rigor of Rule 38(b) could be relaxed, the Court itself being evidently unaware of Rule 39(b) which is not cited. When even the Court occasionally overlooks a rule litigants should not be deprived of fundamental rights for similar occasional short-term omissions.

In *Krussman v. Omaha Woodmen Life Ins. Soc.*, 2 F.R.D. 3, no affidavit of any kind was filed, and the Court therefore had nothing in its discretion to consider. Here the reverse is true, there is no counter-affidavit to contradict the affidavit filed on behalf of appellant. (Tr. 24.) There is therefore no basis on which to disregard the affidavit and deny jury trial.

In *Arnold v. Chicago, B. & Q. R. Co.*, 7 F.R.D. 678, no demand for jury was ever made, nor was the failure to do so ever explained.

Bowles v. Samonas, 7 F.R.D. 104, typically involved a six-months-late demand made four days before the

trial date. Prejudice to Court and opponent are obvious, and the facts completely unlike those in the instant case.

In short, the decisions in the cases cited by appellee were shaped by the facts of the individual actions; facts in each case completely different from those of the case at bar.

VI. ANSWERING APPELLEE'S CONTENTION B THAT APPELLANT ACQUIESCED IN HER DAY IN COURT WITHOUT A JURY. (A.R.B., 46-49.)

Appellee's citation of advisory jury cases are not in point. Nor does one single opinion cited involve a demand made prior to trial. Appellant's rights here, however, were preserved by motion prior to setting, and redress is properly sought by this appeal. *Baylis v. Traveler's Ins. Co.,* 113 U.S. 316, 28 L.Ed. 989; *Abbe v. New York, N. H. & H. R. Co.,* 171 F. (2d) 387; *Victor Talking Machine Co. v. George,* 105 F. (2d) 697, 699. To state that appellant has had her "day in court" is to reason in a circle, as discussed supra in Section II of this brief.

VII. ANSWERING APPELLEE'S CONTENTION C THAT THE AUTHORITIES DO NOT SUPPORT APPELLANT. (A.R.B., 50-52.)

Appellant cited 28 cases in her opening brief. Appellee here pretends to answer but 6 of them. We are satisfied that the decisions stand for the propositions for which they were cited.

VIII. CONCLUSION.

In conclusion we refer to our opening brief which clearly outlines the issues on this appeal and briefly covers the pertinent authorities. Appellee has failed to answer it in a brief twice as long, nor even to *pretend* to answer the constitutional question advanced. Comparison of the facts of the instant case with those cited by appellee on the issue of abuse of discretion serves but to emphasize the abuse that here occurred. The Court erred in denying appellant's motions and judgment should be reversed and trial by jury ordered.

Dated, San Francisco, California,
October 17, 1951.

Respectfully submitted,
J. Edward Johnson,
W. G. Harmon,
William H. Henderson,
Robert H. Johnson,
Attorneys for Appellant.